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CONSISTENCY IS KEY: TO PRESERVE LEGISLATIVE INTENT THE IRS MUST AFFORD LEGAL RECOGNITION TO NON-MARITAL RELATIONSHIPS IN A POST-DOMA WORLD

Shane R. Martins*

I. INTRODUCTION

The United States is currently engulfed in a transformation that may be more powerful than one based on culture, history, or even tradition: a transformation based on acceptance. Over the past several decades, the rights afforded to homosexuals and same-sex couples have remained one of the more hotly contested issues. While supporters of the gay rights movement may not be completely satisfied with the current state of equality, undeniable progress has been made with respect to the rights of gay Americans. Although societal progress is generally favorable, the resulting change can often generate uncertainty and confusion, as is the case with the current tax system and its treatment of same-sex couples.

Recently, the judicial branch has been home to countless claims concerning the unequal treatment of same-sex couples. More specifically, there were several cases pending in federal courts regarding the constitutionality of the Defense of Marriage Act (DOMA).¹ All of the cases questioning DOMA's

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1. Defense of Marriage Act., Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 28 U.S.C. § 178C (2012) and 1 U.S.C. § 7 (2012)).

constitutionality focused on one argument: DOMA violated the Equal Protection Clause.² The Supreme Court of the United States seemed to agree with this contention, and on June 26, 2013 it found DOMA to be an unconstitutional "deprivation of the liberty of the person protected by the Fifth Amendment".³

Prior to the Court's ruling in *United States v. Windsor*, Section 3 of DOMA prevented any federal institution or agency from recognizing same-sex marriages.⁴ Consequently, the Internal Revenue Service (IRS) was unable to completely defer to each state's definition of marriage. However, the recent declaration of DOMA's unconstitutionality means that the federal statute will no longer circumscribe the Internal Revenue Code's (IRC) recognition of marriages. Due to the precedent set by extensive case law,⁵ the IRS will now have to recognize same-sex marriages in states where such unions are legal. Although the overturning of DOMA will create a greater sense of uniformity among the states that recognize same-sex marriages, it will still leave one problem unsolved: How will the IRS tax other legally recognized unions, such as civil unions and domestic partnerships?⁶

Without receiving the necessary congressional mandate, the

2. The Equal Protection Clause is found in the Fourteenth Amendment of the United States Constitution. The Clause states:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

3. *United States v. Windsor*, 133 S.Ct. 2675, 2695 (2013).

4. *Id.* at 2683.

5. *See, e.g., Sullivan v. Comm'r*, 256 F.2d 664, 666 (4th Cir. 1958); *Lee v. Comm'r*, 550 F.2d 1201, 1202 (9th Cir. 1977). Moreover, on August 29, 2013 the U.S. Department of the Treasury issued a statement that "all legal same-sex marriages will be recognized for federal tax purposes." *See* U.S. Dep't of Treasury, *All Legal Same-Sex Marriages Will Be Recognized for Federal Tax Purposes*, U.S. DEP'T OF TREASURY (August 29, 2013), <http://www.treasury.gov/press-center/press-releases/Pages/jl2153.aspx>.

6. For the remainder of this Note, civil unions and domestic partnerships will be collectively referred to as non-marital relationships.

IRS has already indicated that it will not recognize civil unions and domestic partnerships as eligible for the deductions and filing statuses available to married couples.⁷ However, many states that offer non-marital relationships define, in their respective statutes, that the parties in these non-marital relationships will receive the same rights, benefits, and protections that are afforded to legally married couples.⁸ With same-sex married couples now recognized by the federal government, this Article proposes that the federal government also give spousal recognition to taxpayers in legally recognized non-marital relationships in states that treat such unions as marriage equivalents.⁹ In doing so, the federal government will continue to adhere to its objectives of geographic uniformity¹⁰ and horizontal equity,¹¹ all while following longstanding precedent of deferring to state familial law.¹²

Part II of this Article will provide an introduction to Federal Income Tax, the concept of “filing jointly,” and the benefits provided to married couples under the IRC. Part III will provide an overview of the history of same-sex marriage in the United States, focusing primarily on the Defense of Marriage Act and how the Supreme Court’s recent ruling in *Windsor* has drastically changed the recognition afforded to same-sex couples. Part IV will analyze the way in which states recognize same-sex relationships. Part IV will continue with an analysis of the United Kingdom’s treatment of non-marital relationships and examine why the foreign nation’s law regarding such would

7. See Internal Revenue Service, *Questions and Answers for Registered Domestic Partners*, INTERNAL REVENUE SERVICE (Sep. 19, 2013), <http://www.irs.gov/uac/Answers-to-Frequently-Asked-Questions-for-Registered-Domestic-Partners-and-Individuals-in-Civil-Unions> (last visited Feb. 20, 2013).

8. See, e.g., CAL. FAM. CODE § 297.5 (2007) (West 2003); N.J. STAT. ANN. § 26:8A-2(d) (West 2007); OR. REV. STAT. § 106.340 (2013).

9. For purposes of this Article, the term “marriage equivalent” indicates that the non-marital relationship is afforded the same rights, benefits, and responsibilities that are afforded to marriages. Thus, the only difference being the term assigned to the union.

10. *Druker v. Comm’r*, 697 F.2d 46, 48 (2d Cir. 1982).

11. *Id.* at 50.

12. See *supra* note 5 and accompanying text.

be operative in the United States. Part V of this Article will provide an overview of the current federal income tax laws as prescribed to non-marital relationships. Part VI proposes that the United States government should offer spousal recognition to non-marital relationships, but only in the states where such relationships are afforded the same rights as legally recognized marriages. Finally, Part VI will show that this method of taxation is essential in order to ensure that the government remain consistent with both legal precedent and congressional intent.

II. THE FEDERAL INCOME TAXATION OF MARRIAGES

A. HISTORY OF JOINT FILINGS AND THE MARITAL DEDUCTION

The modern income tax, and its treatment of married couples, began in 1913.¹³ Ratified by the states in 1913,¹⁴ the Sixteenth Amendment grants Congress the “[P]ower to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.”¹⁵ The ratification of the Sixteenth Amendment eliminated the congressional hurdle created by *Pollock v. Farmers’ Loan & Trust Co.*,¹⁶ thereby making it possible for the government to institute a national income tax.¹⁷ Congress

13. Christopher J. Hayes, *Married Filing Jointly: Federal Recognition of Same-Sex Marriages Under the Internal Revenue Code*, 47 HASTINGS L.J. 1593, 1603 (1996).

14. Tax Analysts, *The Income Tax Archives*, TAXANALYSTS (2014), <http://www.taxhistory.org/www/website.nsf/Web/THM1901?OpenDocument>.

15. U.S. CONST. amend. XVI.

16. *Pollock v. Farmers’ Loan & Trust Co.*, 15 S.Ct. 673 (1895). Charles Pollock, a stockholder of Farmers’, instituted a suit on behalf of the company’s stockholders, challenging their decision to provide the Department of Treasury with the names of all stockholders that would be subject to the tax imposed by the Wilson-Gorman Tariff. *Id.* at 674. Ruling in favor of Pollock, the Supreme Court held, “under the state system of taxation, all taxes on real estate or personal property or the rents or income thereof were regarded as direct taxes.” *Id.* at 686. The Court’s decision did not rule on the constitutionality of the premise of income tax; rather, it only ruled on the method of taxation mandated by the Wilson-Gorman Tariff. *Id.* Consequently, the Court’s decision should merely be viewed as a hurdle to the implementation of a national income tax.

17. Daniel Milstein, *‘Til Death Do Us File Joint Income Tax Returns (Unless We’re*

then immediately passed the Revenue Act of 1913,¹⁸ which lowered tariff rates and included an income tax to compensate for lost wages resulting from such decrease.¹⁹

Four years later, through the enactment of the Revenue Act of 1918,²⁰ Congress permitted married couples to file a “single joint return” for federal income taxes.²¹ The Act provided, in part, “If a husband and wife living together have an aggregate net income of \$2,000 or over, each shall make such a return unless the income of each is included in a single joint return.”²² Although the Revenue Act of 1918 allowed married couples to file a single return, federal taxation continued to emphasize the individual over the marital unit.²³ In fact, the applicable tax rates were identical for married couples and unmarried individuals.²⁴ Consequently, joint filings were only advantageous in highly “unusual circumstances.”²⁵

In its decision in *Lucas v. Earl*, the Supreme Court echoed the sentiment that individuals were emphasized over married couples.²⁶ In *Lucas*, the taxpayer, Guy Earl, and his wife agreed that any property, including earnings, acquired during the existence of their marriage should be treated as owned by them equally.²⁷ Pursuant to this agreement, Mr. Earl’s income tax return reported only half of his income for the year in question.²⁸ However, the Commissioner of Internal Revenue and the Board of Tax Appeals believed that Earl should have reported his

Gay), 9 CARDOZO PUB. L. POL’Y & ETHICS J. 451, 455 (2011).

18. Revenue Act of 1913, Pub. L. No. 63-16, 38 Stat. 114 (1913).

19. *Id.*; see Tax Analysts, *supra* note 14.

20. Revenue Act of 1918, Pub. L. No. 65-254, 40 Stat. 1057 (1918).

21. Revenue Act of 1918, Pub. L. No. 65-254, § 223, 40 Stat. 1057, 1074 (1918); See also Carlton Smith & Edward Stein, *Dealing with DOMA: Federal Non-Recognition Complicates State Income Taxation of Same-Sex Relationships*, 24.1 COLUM. J. GENDER & L. 29, 37 (2012).

22. Revenue Act of 1918, Pub. L. No. 65-254, § 223, 40 Stat. 1057, 1074 (1918).

23. Milstein, *supra* note 17, at 456.

24. *Id.*

25. See Boris I. Bittker, *Federal Income Taxation and the Family*, 27 STAN. L. REV. 1389, 1400 (1975).

26. *Lucas v. Earl*, 281 U.S. 111, 114 -15 (1930).

27. *Id.* at 113-14.

28. *Id.*

entire income.²⁹ On behalf of the majority, Justice Holmes wrote, “[N]o distinction can be taken according to the motives leading to the arrangement by which the fruits are attributed to a different tree from that on which they grew.”³⁰ One tax scholar has interpreted Holmes’s colorful analogy to mean “it became virtually impossible for a taxpayer with income from wages, salaries, or professional fees to shift these items to other taxpayers such as a spouse or child.”³¹

However, in the same year, the Supreme Court issued a ruling that married couples could, in fact, split their incomes so long as the taxpayers resided in a community property state.³² In *Poe v. Seaborn*, H.G. Seaborn and his wife each filed a tax return consisting of half of the couple’s income.³³ The Commissioner of Internal Revenue for the District of Washington, however, asserted that Seaborn should have reported all of the income, rather than splitting it with his wife.³⁴ Ruling in favor of Seaborn, the Court held, “A wife has, in Washington, a vested property right in the community property, equal with that of her husband; and in the income of the community, including salaries or wages of either husband or wife, or both.”³⁵

Subsequent to the Court’s ruling, several non-community property states began adopting community property systems,³⁶ thereby providing their residents with the benefits allowed under *Poe*.³⁷ There was not, however, a nation-wide adoption of the community property system, as many states refused to

29. *Id.* at 113.

30. *Id.* at 115.

31. Bittker, *supra* note 25, at 1401.

32. *Poe v. Seaborn*, 282 U.S. 101 (1930). Community property laws generally state that property acquired during a marriage is community property and therefore each spouse has a vested half-interest in the income of the partnership. See Smith, *supra* note 21 at 38.

33. *Poe*, 282 U.S. at 108.

34. *Id.* at 109.

35. *Id.* at 111.

36. Lawrence Zelenak, *Marriage and the Income Tax*, 67 S. CAL. L. REV. 339, 345 (1994).

37. *Id.*

implement such property laws.³⁸ Consequently, “confusion arose as to when a married couple could split their income.”³⁹ For instance, in the case of *Commissioner v. Harmon*, the Supreme Court was concerned with the legality of the community property law in Oklahoma that had been enacted shortly after *Seaborn*.⁴⁰ With a belief that it would collect more revenue,⁴¹ the states permitted married couples to choose between following a community property scheme or a non-community property scheme.⁴² Relying on *Lucas*, the Court noted, “The important fact is that the community system of Oklahoma is not a system, dictated by State policy, as an incident of matrimony.”⁴³ Finding that the elective nature of the system was improper,⁴⁴ the Court held that only non-elective community property laws incident to marriage could permit income splitting.⁴⁵

Also alarming was that this lack of conformity among the states had the potential to put married couples with equal incomes into different tax brackets.⁴⁶ The resulting disparity is contradictory to the Court’s finding that there is a constitutional requirement for geographic uniformity in regards to federal taxation.⁴⁷ Consequently, in 1941 Congress attempted to

38. *Id.*

39. Milstein, *supra* note 17, at 457-58.

40. *Comm’r v. Harmon*, 323 U.S. 44 (1944).

41. *Id.* at 44-45.

42. *Id.*

43. *Id.* at 48.

44. *Id.* at 47.

45. *Id.*

46. For example, assume a married couple’s only income is \$30,000 resulting from the husband’s wages. In a community property state, each spouse could file a return reporting income of \$15,000. However, in a separate property state, the husband would have to file a tax return reporting income of \$30,000. Due to the progressive nature of tax rates, the couple in the community property state would be paying a lower federal tax rate than the couple in the separate property state.

47. *Poe v. Seaborn*, 282 U.S. 101, 117 (1930) (internal citations omitted):

Finally the argument is pressed upon us that the Commissioner’s ruling will work uniformity of incidence and operation of the tax in the various states, while the view urged by the taxpayer will make the tax fall unevenly upon married people. ... The answer to such argument, however, is, that the constitutional requirement of uniformity is not intrinsic, but geographic.

implement a system of mandatory joint returns, hoping that such a system would prevent the residence of a taxpayer from being a factor in determining one's tax bill.⁴⁸ The House Committee on Ways and Means recommended that Congress implement a system in which a married couple pays tax at a rate identical to that of a single person with the same income.⁴⁹ The Committee's goal in the implementation of such a system was to protect horizontal equity⁵⁰ and geographical uniformity.⁵¹

Although Congress' initial efforts in 1941 were unsuccessful, the legislative branch was eventually able to resolve the issue created by the patchwork nature of the states' adoption of community property states. To eliminate the geographic disparity, Congress enacted the Revenue Act of 1948.⁵² The Act allowed all couples to aggregate their income and deductions on a single joint return and "to pay a tax equal to twice what a single person would pay on one-half their consolidated taxable income."⁵³ Specifically, the Act allowed that "[a] husband and wife may make a single return jointly. Such a return may be made even though one of the spouses has neither gross income nor deductions."⁵⁴ Essentially, this created a federally adopted community property system, but now "the political credit for reducing taxes was concentrated on Congress rather than dispersed among the state legislatures."⁵⁵ Offering its support, the Senate Committee explained the result of the Act:

Adoption of these income-splitting provisions will produce substantial geographical equalization in the impact of the tax on individual incomes. The

48. H.R. REP. NO. 77-1040 (1941).

49. *Id.* at 69.

50. Horizontal equity is the idea that married couples with the same joint income should pay tax at a rate identical to that of a single person with the same income. See Milstein, *supra* note 17, at 458.

51. H.R. REP. NO. 77-1040, at 17 (1941).

52. Smith, *supra* note 21, at 39.

53. Bittker, *supra* note 25, at 1412-13.

54. Revenue Act of 1948, Pub. L. No. 80-471, § 303, 62 Stat. 110, 115 (1948).

55. Bittker, *supra* note 25, at 1413.

impetuous enactment of community-property legislation by States that have long used the common law will be forestalled. The incentive for married couples in common-law States to attempt the reduction of their taxes by the division of their income through such devices as trusts, joint tenancies, and family partnerships will be reduced materially. Administrative difficulties stemming from the use of such devices will be diminished, and there will be less need for meticulous legislation on the income-tax treatment of trusts and family partnerships.⁵⁶

Finally, in 1969, reacting to their belief that single taxpayers were being overtaxed,⁵⁷ Congress created the current system, IRC Section 1,⁵⁸ which provided five different tax rate tables.⁵⁹ To eliminate the potential over-taxing of a single taxpayer, the Tax Reform Act of 1969 allowed married couples to file separate returns.⁶⁰ Feeling that married taxpayers who elected to file separately “should have their own tax rate providing the least favorable rates,”⁶¹ the Act instituted tax rates that would result in “an unmarried individual taxpayer [] never [having to] pay more than 120% of what a married taxpayer with the same income would pay, while setting the rates for married taxpayers filing separately at the old rate for unmarried taxpayers.”⁶² This differential rate setting “led to a marriage penalty, in which a married couple with two earners would have had to pay higher taxes than they would if they had never been married.”⁶³ The United States Court of Appeals, however, upheld the ability of Congress to set differential rates based on marital status.⁶⁴ In

56. S. REP. NO. 80-1013, at 1187 (1948).

57. Smith, *supra* note 21, at 40.

58. I.R.C. § 1 (2014).

59. *Id.*

60. Tax Reform Act of 1969, Pub. L. No. 91-172, 83 Stat. 487 (1969).

61. Smith, *supra* note 21, at 40.

62. Milstein, *supra* note 17, at 460.

63. *Id.*

64. See *Druker v. Comm’r*, 697 F.2d 46 (2d Cir. 1982). The plaintiffs, a married couple in which each spouse earned income, filed their taxes under the “married filing separately” category. *Id.* at 47. However, the tax rates applied to taxpayers filing as “married filing separately” were higher than those applied to unmarried individuals. *Id.* Consequently, the Druker’s filed their tax returns using the rates

Druker v. Commissioner, the court reasoned, "Congress in 1969 decided to hold fast to horizontal equity, even at the price of imposing a 'penalty' on two-earner married couples like the Drukers. There is nothing in the equal protection clause that required a different choice."⁶⁵ Not only does the court's ruling reiterate the importance of horizontal equity, it also affirms Congress' ability to afford special recognition to married couples under the IRC.⁶⁶

The current federal income tax allows for the joint filing of returns between husband and wife.⁶⁷ When making a joint return, "the tax shall be computed on the aggregate income and the liability with respect to the tax shall be joint and several."⁶⁸ In addition to their eligibility of joint-filing status, federally recognized married couples are viewed differently than single taxpayers in various provisions throughout the IRC. In fact, marital status alone can subject individual taxpayers to provisions they would not be subjected to otherwise. Consequently, the Code's continual reference to "spouse" places both benefits and burdens on married taxpayers.⁶⁹

B. BENEFITS OF SPOUSAL RECOGNITION

In addition to joint-filing eligibility, marital recognition prescribes myriad benefits upon taxpayers. For instance, legally married taxpayers can freely transfer property and wealth to one another without the imposition of income, estate and gift taxes.⁷⁰ A non-spouse taxpayer, however, faces marginal tax rates on the

prescribed to unmarried individuals. *Id.* Relying on their finding that the Equal Protection Clause did not require a different choice, the Court affirmed Congress' ability to set differential rates based on marital status. *Id.* at 50.

65. *Druker*, 697 F.2d at 50.

66. *Id.*

67. I.R.C. § 6013 (2014).

68. I.R.C. § 6013(d)(3) (2014).

69. Hayes, *supra* note 13, at 1599-1602.

70. All transfers of property between spouses are treated as a gift. I.R.C. § 1041(a)-(b) (2012). Because gifts are excluded from gross income, they are not subject to income taxation. I.R.C. §§61, 63, 102(a) (2014).

bequest of an estate that exceeds \$5,250,000.⁷¹ Moreover, spouses receive certain exclusion benefits from the gain on the sale of their principal residence.⁷² Legally married taxpayers can also receive the fringe benefits offered by their spouse's employer without the imposition of income taxes.⁷³ Generally, such fringe benefits include health insurance,⁷⁴ employee discounts,⁷⁵ and even tuition discounts at educational institutions.⁷⁶ Such benefits, of course, are only permitted to married taxpayers, as marriage is the only entity eligible to receive spousal treatment.⁷⁷

C. *BURDENS ASSOCIATED WITH SPOUSAL RECOGNITION*

Although being federally recognized as married provides an array of benefits to eligible taxpayers, there are also burdens that individuals will face as a result of their marital status. In fact, in a marriage where both spouses work full time, they will *usually* pay more in taxes as a married couple than they would if they were both single.⁷⁸ In addition to the potentially heightened tax liability resulting from joint filing, the IRC contains certain provisions that are actually burdensome to

71. Internal Revenue Service, *Instructions to Form 706*, INTERNAL REVENUE SERVICE, <http://www.irs.gov/instructions/i706/ch01.html#d0e120> (last visited Mar. 17, 2014).

72. In order to qualify as a principal residence, the taxpayer(s) must have occupied the residence for two of the past five years and it must be used as their primary residence (not a summer or weekend home). See I.R.C. § 121 (2014).

73. The ability to receive a spouse's fringe benefits is currently a focal point in the same-sex marriage debate, as taxpayers in such relationships must pay federal taxes on the portion of the insurance premium that was paid by the employer as a result of extending coverage to employee's partner. See Movement Advancement Project, Family Equality Council, & Center for American Progress, *Unequal Taxation and Undue Burdens for LGBT Families*, FAMILY EQUALITY COUNCIL, Apr. 2012, at 14, available at <http://action.familyequality.org/site/DocServer/Unequal-Taxation-Undue-Burdens-LGBT-Families.pdf?docID=2881> (last visited Nov. 20, 2012).

74. See I.R.C. §§ 105, 106 (2014).

75. See I.R.C. § 132(a)(1)-(2), (b), (c)(1), (h)(2) (2014).

76. See I.R.C. § 117(d) (2014).

77. Hayes, *supra* note 13, at 1600-1602.

78. Zelenak, *supra* note 36 at 364. The likelihood that married taxpayers will pay more in taxes than if they were single goes to the concept of the marriage penalty. See Milstein, *supra* note 17, at 460.

married taxpayers. For instance, individuals are unable to claim a loss on the sale or exchange of property when it is between spouses.⁷⁹ Section 267(a) of the IRC forbids a deduction “[I]n respect of any loss from the sale or exchange of property, directly or indirectly between” spouses.⁸⁰ Although it is unlikely that couples will consider the effects of various IRC provisions when considering a legally recognized marriage, the creation of such can unquestionably subject the taxpayers to tax related burdens.

D. GEOGRAPHIC DISPARITY STRIKES BACK

It took several decades for the legislative and executive branches to eliminate the unequal tax treatment of couples among the states. Unfortunately, the problem Congress purported to resolve by enacting the Revenue Act of 1948 is now apparent in the tax treatment of many same-sex unions. In fact, the current disparity is even greater than that of the community property divide in the early 1900s; for, not only is there a lack of uniformity among the states, but because the federal government refuses to recognize non-marital relationships there is also a disparity in tax treatment of the couples between the state and federal level. As articulated by the Court in *Poe*, this geographic disparity shall not be tolerated, as there is a constitutional requirement for geographic uniformity in the operation of taxation among the states.⁸¹ As proposed in Part VI of this Article, in order to maintain the constitutionally mandated ideal of geographic uniformity, the federal government must afford non-marital relationships in broad recognition states the same benefits and burdens afforded to legally recognized married couples.

79. I.R.C. § 267(a)(1) (2012).

80. *Id.*

81. *Poe v. Seaborn*, 282 U.S. 101, 117 (1930).

III. MARRIAGE "EQUALITY" IN THE UNITED STATES

Over the past several decades, members of the gay community, along with its supporters, have advocated for equal rights.⁸² Conversely, those opposed to equal rights have advocated keeping marriage between a man and a woman. The predominant struggle of the gay rights movement has been the attempt to win the right to marriages that will be recognized in both the civil and religious society.⁸³ The year 1985 marked a milestone for marriage equality when, for the first time, a Supreme Court Justice indicated that homosexuals may qualify as a suspect class.⁸⁴ Since the Court's ruling in 1985, the rights afforded to same-sex partners have expanded, with some states even legally recognizing same-sex relationships. However, despite the progress of the gay rights movement, there is still much to be done, even in areas where same-sex partners may enter into legally recognized relationships. With a number of states now affording rights to same-sex couples, new questions arise as to where individuals in these relationships fit in for purposes of the IRC.

82. See PBS, *Timeline: Milestones in the American Gay Rights Movement*, AM. EXPERIENCE, <http://www.pbs.org/wgbh/americanexperience/features/timeline/stonewall/> (last visited Mar. 17, 2014).

83. Hayes, *supra* note 13, at 1594.

84. *Rowland v. Mad River Local Sch. Dist.*, Montgomery Cnty., Ohio, 470 U.S. 1009, 1014 (1985) (Brennan, J., dissenting):

First, homosexuals constitute a significant and insular minority of this country's population. Because of the immediate and severe opprobrium often manifested against homosexuals once so identified publicly, members of this group are particularly powerless to pursue their rights openly in the political arena. Moreover, homosexuals have historically been the object of pernicious and sustained hostility, and it is fair to say that discrimination against homosexuals is 'likely ... to reflect deep-seated prejudice rather than ... rationality.' [] State action taken against members of such groups based simply on their status as members of the group traditionally has been subjected to strict, or at least heightened, scrutiny, by this Court.

A. THE CONTINUED ABILITY OF STATES TO REGULATE

The state power and authority over marriage is one that is deeply rooted in history and tradition. For over one hundred years it has been observed that “[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States.”⁸⁵ As stated by the Supreme Court in *Haddock v. Haddock*, “the States, at the time of the adoption of the Constitution, possessed full power over the subject of marriage and divorce . . . [T]he Constitution delegated no authority to the Government of the United States on the subject of marriage and divorce.”⁸⁶

Consequently, in remaining consistent with this allocation of authority, “the Federal Government, throughout our history, has deferred to state-law policy decisions with respect to domestic relations.”⁸⁷ Prior to the congressional enactment of DOMA in 1996, the federal government had never defined marriage.⁸⁸ Rather, such definitions were determined respectively amongst the states. The Court in *United States v. Lopez* recognized that in the context of marriage, states have enjoyed the latitude to experiment and “exercise their own judgment in an area to which [they] lay claim by right of history and expertise.”⁸⁹ As a result of leaving the regulation of marriage to the states, the federal government has “accepted all state marital status determinations for purposes of federal law.”⁹⁰ By granting legal recognition to non-marital

85. In re Burrus, 136 U.S. 586, 593-94 (1890). See, e.g., *Mansell v. Mansell*, 490 U.S. 581, 587, (1989) (“[D]omestic relations are preeminently matters of state law”); *Moore v. Simms*, 442 U.S. 415, 435 (1979) (“Family relations are a traditional area of state concern”).

86. *Haddock v. Haddock* 201 U.S. 562, 575 (1906) (overruled on other grounds by *Williams v. North Carolina*, 317 U.S. 287 (1942)).

87. *U.S. v. Windsor*, 570 U.S. 2675, 2691 (2013).

88. Milstein, *supra* note 17, at 481.

89. *United States v. Lopez*, 514 U.S. 549, 583 (1995) (Kennedy, J., concurring).

90. See Milstein, *supra* note 17, at 462-63 (comparing this concept to interracial marriages); see also *Massachusetts v. U.S. Dept. of Health and Human Services*, 698 F. Supp. 2d 234, 237 (D. Mass. 2010).

relationships, a state proclaims its desire to treat this class of persons with dignity and status. Unfortunately, however, without federal recognition of these unions, this dignity and status is compromised.

B. THE ENACTMENT OF DOMA

In the 1970's there were a handful of court challenges regarding the definition of marriage.⁹¹ However, it was not until the Hawaii Supreme Court ruled on the constitutionality of same-sex marriage that the issue became a widespread national concern. In *Baehr v. Lewin*⁹² the Court ruled that a ban on same-sex marriage was a form of sex discrimination, and therefore under the Hawaii Constitution was entitled to strict scrutiny.⁹³ Out of fear that states would begin to recognize same-sex marriages,⁹⁴ Congress was spurred to action by the *Baehr* decision.⁹⁵ In fact, "[t]he House Judiciary Committee's Report on DOMA [] described *Baehr* as [a] . . . 'legal assault being waged against traditional heterosexual marriage.'"⁹⁶

In 1996, Congress enacted DOMA to "define and protect the institution of marriage."⁹⁷ The Act, which passed both houses of Congress by a large margin—342 to 67 in the House⁹⁸ and 85 to 14 in the Senate⁹⁹—was then signed by President Bill Clinton.¹⁰⁰

91. Lynn D. Wardle, *Who Decides? The Federal Architecture of DOMA and Comparative Marriage Recognition*, 41 CAL. W. INT'L L.J. 143, 146 (2010); see JOANNA GROSSMAN & LAWRENCE FRIEDMAN, *INSIDE THE CASTLE: LAW AND THE FAMILY IN THE 20TH CENTURY AMERICA* 142-44 (2011).

92. *Baehr v. Lewin*, 852 P.2d 44, 47 (Haw. 1993).

93. *Id.* at 67. *Baehr* concerned three same-sex couples that filed suit after being denied marriage licenses. *Id.* at 49. Petitioners argued that the state had acted unconstitutionally because the state's constitution contains an equal rights provision mandating that all persons should be given equal protection of the law. *Id.* at 50.

94. *Windsor v. U.S.*, 699 F.3d 169, 191 (2d Cir. 2012) (Straub, J., concurring).

95. *Id.*

96. *Id.*

97. Defense of Marriage Act. Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 28 U.S.C. § 178C (2012) and 1 U.S.C. § 7 (2012)).

98. 142 CONG. REC. H74840-05 (daily ed. July 12, 1996).

99. 142 CONG. REC. S10129-01 (daily ed. Sept. 10, 1996).

100. Wardle, *supra* note 90, at 145.

On its face, DOMA had two operative sections. Section 2 prevented states from being forced to recognize same-sex marriages issued in other states,¹⁰¹ while Section 3 provided the federal definition of marriage as being only between a man and a woman.¹⁰²

A horizontal provision,¹⁰³ Section 2 of DOMA essentially “amended the Full Faith and Credit Act to grant states the explicit power to refuse recognition of same-sex marriages.”¹⁰⁴ Consequently, immediately following DOMA’s enactment, four-fifths of the states passed statutes or constitutional amendments banning the recognition of same-sex marriages.¹⁰⁵ Section 3, however, was a vertical provision¹⁰⁶ through which the federal government recognized marriage as only between a man and a woman.¹⁰⁷ This section was purported to “prevent federal judges and agency officials from using federal choice of law and interpretative principles to recognize same-sex marriages in federal laws, regulations, and programs before congress decided such recognition was appropriate.”¹⁰⁸ Due to the strict definition provided by Section 3, federal officials and agencies were not forced to use the definition of marriage in states that have

101. *Id.*

No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.

28 U.S.C. § 1738C (2012).

102. Wardle, *supra* note 90, at 145.

103. Section 2 is known as a horizontal provision due to its focus on the relationships between co-equal sovereign states. See Wardle, *supra* note 90, at 145.

104. Grossman, *supra* note 90, at 148. However, it is important to note the argument that this provision was not necessary in order for states to reserve this right, as full faith and credit has never been understood to compel interstate marriage recognition. Grossman, *supra* note 90, at 149.

105. Grossman, *supra* note 90, at 149.

106. Section Three is known as a vertical provision as it focuses on the relationship between the national government and the states. See Wardle, *supra* note 90, at 147.

107. Wardle, *supra* note 90, at 145.

108. *Id.* at 147.

legalized same-sex marriages. Consequently if a state defined marriage to include the union of two same-sex partners, that definition would not be applied when interpreting or administering federal programs and laws. However, this all changed on June 26, 2013 when the Supreme Court of the United States found DOMA unconstitutional, as a “deprivation of the [equal] liberty of [the] persons protected by the Fifth Amendment.”¹⁰⁹

C. WINDSOR AND THE SUCCESSFUL FIGHT AGAINST DOMA

In 1993 Edith Windsor and her now-deceased spouse, Thea Spyer registered as domestic partners in New York City.¹¹⁰ In 2007, Windsor and Spyer were married in Canada, a jurisdiction that allows same-sex marriages.¹¹¹ Upon Spyer’s death in February 2009,¹¹² Spyer’s estate passed to Windsor, as prescribed in Spyer’s last will and testament.¹¹³ However, because of the operation of DOMA, Windsor was ineligible to receive the unlimited marital deduction prescribed by 26 U.S.C. Section 2056(a).¹¹⁴ Consequently, Windsor was required to pay \$363,053 in federal estate taxes on the estate of her late wife.¹¹⁵ Windsor then brought suit seeking a refund of the federal taxes paid on the estate, declaring that Section 3 of DOMA violated the Equal Protection Clause.¹¹⁶ Furthermore, because the state of New York had endorsed same-sex marriages at the time of Spyer’s

109. U.S. v. Windsor, 133 S.Ct. 2675, 2695 (2013).

110. Windsor v. U.S., 833 F.Supp.2d 394, 397 (S.D.N.Y. 2010).

111. *Id.*

112. *Id.*

113. *Id.*

114. I.R.C. § 2056(a) (2014):

For purposes of the tax imposed by section 2001, the value of the taxable estate shall, except as limited by subsection (b), be determined by deducting from the value of the gross estate an amount equal to the value of any interest in property which passes or has passed from the decedent to his surviving spouse, but only to the extent that such interest is included in determining the value of the gross estate.

115. Windsor v. U.S., 883 F.Supp.2d 394, 397 (S.D.N.Y. 2012).

116. Windsor v. U.S., 699 F.3d 169, 175-76 (2d Cir. 2012).

death,¹¹⁷ the New York Attorney General brought an additional claim that Section 3 not only violated the Equal Protection Clause, but that it also violated the Tenth Amendment's protection of state sovereignty.¹¹⁸

Due to the Executive Branch's decision not to enforce DOMA,¹¹⁹ the Bipartisan Legal Advisory Group (BLAG) was permitted to intervene to defend the constitutionality of the statute.¹²⁰ BLAG argued that the House Judiciary Committee's Report on DOMA justified the Act, as advancing government interests "by (1) defending and nurturing the institution of traditional, heterosexual marriage; (2) defending traditional notions of morality; (3) protecting state sovereignty and democratic self-governance; and (4) preserving scarce government resources."¹²¹ Relying on the Supreme Court's decision in *Baker v. Nelson*,¹²² BLAG argued that DOMA was in fact constitutional, and that Congress had the ability to prohibit same-sex marriage without "offending the Equal Protection

117. *Windsor*, 833 F.Supp.2d at 398.

118. *Id.*

119. In June 2010, President Barack Obama issued a Presidential Memorandum that directed federal agencies to extend benefits to same-sex partners of federal employees. See Press Release, *Presidential Memorandum- Extension of Benefits to Same-Sex Domestic Partners of Federal Employees*, WHITE HOUSE.GOV (June 2, 2010) <http://www.whitehouse.gov/the-press-office/presidential-memorandum-extension-benefits-same-sex-domestic-partners-federal-emplo>. Thereafter, in February 2011, United States Attorney General Holder issued a statement acknowledging that "the President opposes DOMA and believes it should be repealed." Press Release, *Statement of the Attorney General on Litigation Involving the Defense of Marriage Act*, U.S. DEP'T OF JUSTICE (Feb. 23, 2011), <http://www.justice.gov/opa/pr/2011/February/11-ag-222.html>. On that very same day, Attorney General Holder also sent a letter to the Speaker of the House of the United States House of Representatives announcing that the Department of Justice would no longer defend the constitutionality of DOMA. Press Release, *Letter from the Attorney General to Congress on Litigation Involving the Defense of Marriage Act.*, U.S. DEP'T OF JUSTICE (Feb. 23, 2011), <http://www.justice.gov/opa/pr/2011/February/11-ag-223.html>.

120. *Windsor*, 833 F.Supp.2d at 397.

121. *Windsor v. U.S.*, 699 F.3d 169, 197-98 (2d Cir. 2012) (quoting H.R. REP. NO. 106-664, at 3 (1996)).

122. *Baker v. Nelson*, 191 N.W.2d 185 (1971) (holding that the use of the traditional definition of marriage for a state's own regulation of marriage did not violate equal protection).

Clause.”¹²³ However, the district court found persuading precedent indicating that *Baker* did not control the equal protection review of DOMA.¹²⁴

“Equal protection requires the government to treat all similarly situated persons alike.”¹²⁵ Moreover, “The ‘promise [of] equal protection of the laws must coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons.’”¹²⁶ Generally, legislation is presumed to be valid if the classification drawn is rationally related to a legitimate state interest.¹²⁷ However, when a classification is not “precisely tailored to serve a compelling governmental interest,” the court, using strict scrutiny, may find that it violates equal protection.¹²⁸ Reasoning that DOMA did not further Congress’ goal of promoting the traditional institution of marriage, the U.S. District Court for the Southern District of New York held that DOMA was not a legitimate method for promoting or maintaining consistency in marital benefits provided by the federal government, in light of the states’ role in regulating

123. *Windsor*, 699 F.3d at 178.

124. See *Massachusetts v. U.S. Dep’t of Health and Human Services*, 682 F.3d 1, 8 (1st Cir. 2012) (finding that *Baker* did not “rest on a constitutional right to same-sex marriage”); *Windsor v. U.S.*, 833 F.Supp.2d 394, 399-400 (S.D.N.Y. 2012) (distinguishing the case from *Baker*, the Court wrote, “The case before the Court does not present the same issue as that presented in *Baker*... Accordingly . . . the Court does not believe that *Baker* ‘necessarily decided’ the question of whether DOMA violates the Fifth Amendment’s Equal Protection Clause.”); *Pedersen v. Office of Pers. Mgmt.*, 881 F. Supp. 2d 294, 308 (D. Conn. 2012) (“DOMA impacts federal benefits and obligations, but does not prohibit a state from authorizing or forbidding same-sex marriage, as was the case in *Baker*.”); *Golniski v. U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 982, (N.D. Cal. 2012) (“The failure of the federal government to recognize Ms. Golinski’s marriage and to provide benefits does not alter the fact that she is married under state law.”); *Dragovich v. U.S. Dept. of Treasury*, 872 F. Supp. 2d 944, 952 (N.D. Cal. 2012). See also *Perry v. Brown*, 671 F.3d 1052, 1082 (9th Cir. 2012) (finding that *Baker* did not preempt consideration of Proposition 8 case, because “the question of the constitutionality of a state’s ban on same-sex marriage” was not before the court.).

125. *Windsor v. U.S.*, 833 F.Supp.2d 394, 399-400 (S.D.N.Y. 2012) (Citing *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985)).

126. *Windsor*, 833 F. Supp. 2d at 400 (Quoting *Romer v. Evans*, 517 U.S. 620, 631 (1996)).

127. *Id.* at 400.

128. *Id.*

domestic relations, and that Congress' interest in conserving the public fisc could not serve the purpose alone.¹²⁹ Finding that DOMA was not rationally related to a compelling governmental interest,¹³⁰ the court subjected the legislation to heightened scrutiny.¹³¹ Pursuant to the principles established regarding strict scrutiny, the court found that Section 3 of DOMA did not "pass constitutional muster."¹³² Thereafter, on October 18, 2012 the United States Court of Appeals for the Second Circuit affirmed the District Court's grant of motion for summary judgment.¹³³ Finally, on June 26, 2013 the Supreme Court of the United States affirmed the judgment of the United States Court of Appeals for the Second Circuit, finding DOMA unconstitutional as a "deprivation of the [equal] liberty of the person protected by the Fifth Amendment."¹³⁴

Due to the Constitutional guarantee of equality, the Court

129. *Id.* at 403-06.

130. *Id.* at 403.

131. *Id.* at 402.

132. *Id.* The court reasoned, "The Supreme Court's equal protection decisions have increasingly distinguished between '[l]aws such as economic or tax legislation that are scrutinized under rational basis review[, which] normally pass constitutional muster', and 'law[s that] exhibit[]... a desire to harm a politically unpopular group,' which receive 'a more searching form of rational basis review... under the Equal Protection Clause.'" *Id.* Compare *Lawrence v. Texas*, 539 U.S. 558, 580 (2003) (O'Connor, J., concurring) ("When a law exhibits such a desire to harm a politically unpopular group, we have applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause.") and *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 188 (1980) (Brennan, J., dissenting) ("In other cases, however, the courts must probe more deeply.") with *City of Cleburne, Tex. v. Cleburne Living Center*, 473 U.S. 432, 459-60 (1985) (Marshall, J., concurring in part and dissenting in part) ("The refusal to acknowledge that something more than minimum rationality review is at work here is, in my view, unfortunate.... [B]y failing to articulate the factors that justify today's 'second order' rational-basis review, the Court provides no principled foundation for determining when more searching inquiry is to be invoked.") and *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 321 (1976) (Marshall, J., dissenting) ("[T]he Court has rejected, albeit *sub silentio*, its most deferential statements of the rationality standard in assessing the validity under the Equal Protection Clause of much noneconomic legislation."). *But see* *U.S. R.R. Ret. Bd.*, 449 U.S. at 176 n.10 ("The comments in the dissenting opinion about the proper cases for which to look for the correct statement of the equal protection rational-basis standard, and about which cases limit earlier cases, are just that: comments in a dissenting opinion.").

133. *Windsor v. U.S.*, 699 F.3d 169, 188(2d Cir. 2012).

134. *Windsor*, 133 S. Ct. at 2695.

determined that disparate treatment of same-sex couples is not justified by a “bare congressional desire to harm a politically unpopular group.”¹³⁵ Finding that the Federal government used DOMA to impose restrictions and disabilities,¹³⁶ the Court then addressed whether the resulting injury and indignity was a “deprivation of an essential part of the liberty protected by the Fifth Amendment.”¹³⁷ Concerned with the fact that the federal statute seeks to “injure the very class New York seeks to protect,”¹³⁸ the Court refused to see the Act’s purpose as anything but discriminatory:

The history of DOMA’s enactment and its own text demonstrate that interference with the equal dignity of same-sex marriages, a dignity conferred by the States in the exercise of their sovereign power, was more than an incidental effect of the federal statute. It was its essence . . . The stated purpose of the law was to promote an ‘interest in protecting the traditional moral teachings reflected in heterosexual-only marriage laws.’ Were there any doubt of this far-reaching purpose, the title of the Act conforms it: The Defense of Marriage.¹³⁹

Noting that “DOMA writes inequality into the entire United States Code,”¹⁴⁰ the Court dedicated several pages of its opinion to a discussion of how the lack of federal recognition incorporates difficulties and indignity not just to same-sex couples, but to their children, families, and the communities in which they live their daily lives.¹⁴¹ However, as a result of the Court’s ruling, the federal government will no longer be able to refuse to recognize same-sex marriages in the states that solemnize such. Consequently, those same-sex married couples will be entitled to a joint filing status on their federal income tax return. The unknown, however, concerns the taxation of those same-sex partners in civil unions and domestic partnerships. As

135. *Id.* at 2693. (Quoting *Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)).

136. *Id.* at 2692.

137. *Id.*

138. *Id.* at 2693.

139. *Id.*

140. *Id.* at 2694.

141. *Id.*

the Court mentioned in *Windsor*, the integrity and closeness of a family is something that is undermined and humiliated when the federal government refuses to recognize what some view as “second-tier marriages.”¹⁴² Unfortunately, this “diminishing stability and predictability”¹⁴³ will continue to burden those in non-marital relationships unless the federal government extends to them some type of legal recognition.

IV. COMPARATIVE ANALYSIS: STATES' RECOGNITION OF SAME-SEX RELATIONSHIPS AND HOW THE UNITED KINGDOM'S RECOGNITION OF SUCH PROMOTES CONSISTENCY AND LEGISLATIVE INTENT

While the *Windsor* decision neither legalized nor banned same-sex marriage nationally, there continues to be an ever-progressing method of recognition of same-sex relationships. In 2000, Vermont became the first state to afford legal recognition to same-sex relationships.¹⁴⁴ Since 2000, same-sex relationships have been afforded recognition by a growing number of states.¹⁴⁵ The scope of recognition, however, is inconsistent and seems to change by the mere crossing of state lines, a situation Congress specifically sought to eradicate when revising the federal tax regulations in the 1940s.¹⁴⁶ For instance, some states allow same-sex couples to marry, while other states offer other recognized relationships such as civil unions and domestic partnerships. Not only does this lack of uniformity cause inconsistency among the states, but as discussed in Part V of this Article, it violates long-standing legislative intent.

A. JURISDICTIONS WITH SAME-SEX MARRIAGES

In 2003 Massachusetts became the first state to legalize

142. *Id.*

143. *Id.*

144. VT. STAT. ANN. tit. 15, §§ 1201-1207 (2010). (Enacted in response to *Baker v. Vermont*, 744 A.2d 864, 886 (Vt. 1999)).

145. See discussion *infra* Part IV.A-C.

146. H.R. REP. NO. 77-1040 at 10, 17 (1941).

same-sex marriages as a response to the Supreme Judicial Court's ruling in *Goodridge v. Department of Public Health*.¹⁴⁷ Since the first state legalization of same-sex marriage, the legislatures of several other states have begun taking initiatives towards marriage equality. Currently, seventeen states (California,¹⁴⁸ Connecticut,¹⁴⁹ Delaware,¹⁵⁰ Hawaii,¹⁵¹ Illinois,¹⁵² Iowa,¹⁵³ Maine,¹⁵⁴ Maryland,¹⁵⁵ Massachusetts,¹⁵⁶ Minnesota,¹⁵⁷ New Hampshire,¹⁵⁸ New Jersey,¹⁵⁹ New Mexico,¹⁶⁰ New York,¹⁶¹ Rhode Island,¹⁶² Vermont,¹⁶³ and Washington¹⁶⁴) and the District of

147. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003). The plaintiffs in *Goodrich* were a group of same-sex couples that applied for marriage licenses but were denied. *Id.* at 950. The plaintiffs brought a claim against the state arguing that this denial violated their constitutional rights. *Id.* at 950. The *Goodridge* court analyzed the constitutionality of the denial in two ways, asking, "Does it offend the Constitution's guarantees of equality before the law? Or do the liberty and due process provisions of the Massachusetts Constitution secure the plaintiffs' right to marry their chosen partner?" *Id.* at 953. Finding that denying same-sex couples the right to marry is unconstitutional, the court held same-sex couples would no longer be excluded from marriage rights under Massachusetts law. *Id.* at 968. In their advisory opinion, the court informed the senate that a proposed civil union bill "violates the equal protection and due process requirements of the Constitution of the Commonwealth and the Massachusetts Declaration of Rights," for it "violates the basic premises of individual liberty and equality under law." *Majority Opinion*, BOS. GLOBE (Feb. 3, 2004), http://www.boston.com/news/specials/gay_marriage/sjc_020404/. Consequently, same-sex couples could no longer be excluded from civil rights under Massachusetts state law.

- 148. *Perry v. Schwarzenegger*, 704 F.Supp.2d 921 (N.D.Cal. 2010).
- 149. 2009 CONN. ACTS 09-13, 78-79, 81 (Reg. Sess.).
- 150. H.R. 75, 147th Gen. Assemb. (De. 2013).
- 151. HAW. REV. STAT., § 572-1.7, 1.8, 1.9 (2013).
- 152. 750 ILL. COMP. STAT., 5/212 (effective date June 1, 2014).
- 153. *Varnum v. Brien*, 763 N.W. 2d 862, 907 (Iowa 2009).
- 154. ME. REV. STAT. tit. 23 § 650-A (2013); see also David Sharp, *Main's Same-Sex Marriage Law Goes Into Effect*, HUFFINGTON POST (Dec. 29, 2012), http://www.huffingtonpost.com/2012/12/29/maines-same-sex-marriage-_n_2380334.html.
- 155. MD. CODE ANN., FAM. LAW § 2-201 (LexisNexis 2012).
- 156. *Goodridge*, 798 N.E. 2d at 968.
- 157. MINN. STAT. § 517.01 (2013).
- 158. N.H. REV. STAT. ANN. § 457:1-a (2013).
- 159. N.J. STAT. ANN. §37: 1-31 (West 2013).
- 160. *Griego v. Oliver*, 316 P.3d 865 (N.M. 2013).
- 161. N.Y. DOM. REL. LAW § 10(a) (Consol. 2013).
- 162. R.I. GEN. LAWS § 15-1-1 (2013).
- 163. VT. STAT. ANN. tit. 15, § 8 (2010).
- 164. WASH. REV. CODE § 26.04.010 (2012).

Columbia¹⁶⁵ allow marriages between same-sex partners.¹⁶⁶ In most of these jurisdictions, as discussed *infra* in Part IV of this Article, same-sex couples are recognized as married and therefore receive all of the marital benefits that are available to opposite-sex married couples.¹⁶⁷ Due to such recognition, parties in same-sex marriages are not only eligible to receive the same state issued benefits as opposite-sex married couples, but in a majority of these states they are also able to jointly file their state income tax returns.

B. JURISDICTIONS WITH NON-MARITAL RELATIONSHIPS

Even if a state does not recognize same-sex marriages, there are alternative ways in which the legislature can prescribe civil rights to those in same-sex relationships. Generally, non-marital recognition is granted through a civil union or domestic partnership.¹⁶⁸ States that recognize non-marital relationships have greatly varying definitions of such, the implications of which differ from state to state. For example, Colorado affords same-sex partners a very limited set of rights via its recognition of a "designated beneficiary."¹⁶⁹ Such limited rights include the ability to serve as the beneficiary of a non-probate transfer and the right of survivorship as tenants in common.¹⁷⁰

Although a state's recognition of non-marital relationships certainly affords some rights to the individuals in such unions, there continues to be confusion as to the exact function of a civil

165. Religious Freedom and Civil Marriage Equality Amendment Act of 2009, 57 D.C. REG. (Dec. 18, 2009), *available at* <http://www.dcregs.org/Gateway/NoticeHome.aspx?noticeid=114380>.

166. Freedom to Marry, Inc., *Where State Laws Stand*, FREEDOM TO MARRY, <http://www.freedomtomarry.org/pages/where-state-laws-stand> (last visited Jan. 1, 2013).

167. See Edward Stein, *The Topography of Legal Recognition of Same-Sex Relationships*, 50 FAM. CT. REV. 181 (2012).

168. *Id.* at 181 (Indicating that Nevada and Oregon recognize domestic partnerships); Freedom to Marry, Inc., *States*, FREEDOM TO MARRY, <http://www.freedomtomarry.org/states/> (last visited Apr. 19 2014) (indicating that Colorado recognizes civil unions).

169. COLO. REV. STAT. § 15-22-105 (2009).

170. *Id.*

union or domestic partnership and how these recognized relationships differ from a traditional marriage. While some believe that non-marital relationships are an efficient way of “protecting” traditional marriages,¹⁷¹ others believe that the mere difference in title subjects those in non-marital relationships to second-class recognition.¹⁷²

Although the overturning of DOMA allows same-sex married couples to receive spousal recognition by the IRS, individuals in non-marital relationships continue to experience inconsistent treatment in regards to the way in which they are taxed. While at first glance many would argue that these non-marital relationships should not be afforded marital recognition by the IRS—for even the name itself indicates that they are not marriages—the way in which these unions are recognized by the

171. See Elizabeth M. Glazer, *Civil Union Equality*, CARDOZO L. REV. DE NOVO 125, 132, 143 (2012).

172. The U.S. Court of Appeals for the Ninth Circuit colorfully exemplifies the significant symbolic disparity between domestic partnerships and marriage, stating:

We need consider only the many ways in which we encounter the word ‘marriage’ in our daily lives and understand it, consciously or not, to convey a sense of significance. We are regularly given forms to complete that ask us whether we are “single” or “married.” Newspapers run announcements of births, deaths, and marriages. We are excited to see someone ask, “Will you marry me?”, whether on bended knee in a restaurant or in text splashed across a stadium Jumbotron. Certainly it would not have the same effect to see “Will you enter into a registered domestic partnership with me? Groucho Marx’s one-liner, “Marriage is a wonderful institution... but who wants to live in an institution?” would lack its punch if the word ‘marriage’ were replaced with the alternative phrase. So too with Shakespeare’s “A young man married is a man that’s marr’d,” Lincoln’s “Marriage is neither heaven nor hell, it is simply purgatory,” and Sinatra’s “A man doesn’t know what happiness is until he’s married. By then its too late.” We see tropes like “marrying for love” versus “marrying for money” played out again and again in our films and literature because of the recognized importance and permanence of the marriage relationship. Had Marilyn Monroe’s film been called *How to Register a Domestic Partnership with a Millionaire*, it would not have conveyed the same meaning as did her famous movie, even though the underlying drama for same-sex couples is no different. The name ‘marriage’ signifies the unique recognition that society gives to harmonious, loyal, enduring, and intimate relationships. See *Knight v. Super. Ct.*, 128 Cal. App. 4th 14, 31 (2005) See *Knight v. Super. Ct.*, 26 Cal. Rptr.3d 687 (2005). (“[M]arriage is considered a more substantial relationship and is accorded a greater stature than a domestic partnership.”)

Perry v. Brown, 671 F.3d 1052, 1078 (9th Cir. 2012).

respective states, in tandem with the rights afforded to them by such, lies at the very heart of this Article. As discussed *infra* in Part VI of this Article, although these non-marital relationships are not given the title "marriage," the identical treatment of such, coupled with the lack of federal recognition, continues to foster in the lack of geographic uniformity and horizontal equity that remains a Congressional aim in the area taxation. In order to analyze which states' non-marital relationships the IRS should recognize, this Article will divide the applicable states into two categories: states with broad recognition laws and states with limited recognition laws. This classification of recognition is necessary in order to fully understand which states' non-marital relationships should be recognized by the IRS in order to meet the congressional aims of horizontal equity and geographic uniformity.

1. *States with Broad Recognition Laws*

A broad relationship recognition law "extends to same-sex couples all or nearly all the rights and responsibilities extended to married couples under state law, whether titled a 'civil union' or 'domestic partnership' law."¹⁷³ The majority of states that provide non-marital recognition to same-sex couples afford such relationships with rights, benefits and duties equivalent to those afforded to married couples, and therefore, for the purposes of this Article, will be considered states with broad recognition laws.

Vermont was the trendsetter for this approach, as it was the first state to offer same-sex couples benefits identical to those prescribed by marriage.¹⁷⁴ In *Baker v. State*, the Supreme Court of Vermont held that the state was "constitutionally required to extend same-sex couples the common benefits and protections

173. *Relationship Recognition for Same-Sex Couples in the U.S.*, NATIONAL GAY AND LESBIAN TASK FORCE (Jan. 6, 2014),

http://www.thetaskforce.org/reports_and_research/relationship_recognition.

174. Smith, *supra* note 21, at 56.

that flow from marriage under Vermont law.”¹⁷⁵ The court essentially gave the state government two options: either extend marriage to same-sex couples, or create a “parallel ‘domestic partnership’ system or some equivalent statutory alternative, rests within the Legislature.”¹⁷⁶ Consequently, the Vermont legislature enacted laws creating civil unions for same-sex partners,¹⁷⁷ resulting in the extension of “all the same benefits, protections, and responsibilities under law, whether they derive from statute, administrative or court rule, policy, common law or any other source of civil law, as are granted to spouses in a civil marriage.”¹⁷⁸

A majority of the states that offer non-marital relationship recognition follow Vermont’s approach in treating the relationships as marriage equivalents. In following the Vermont approach, states such as California,¹⁷⁹ Hawaii,¹⁸⁰ Illinois,¹⁸¹ and Oregon¹⁸² give non-marital relationships the same rights and duties prescribed to marriages. The majority of these broad recognition states extend to same-sex partners rights such as property interest, protections such as the marital communications privilege, and benefits such as worker’s compensation.¹⁸³ Moreover, as discussed in Part V of this

175. *Baker v. Vermont*, 744 A.2d 864, 867 (Vt. 1999). It is worth noting that several years later, Vermont enacted legislation affording legal to same-sex married couples. S. 115 Reg. Sess. (Vt. 2009); VT. STAT. ANN. tit. 32, § 5861 (2013).

176. *Id.*

177. VT. STAT. ANN. tit. 15 §§ 1201-07 (2010).

178. VT. STAT. ANN. tit. 15 § 1204(a) (2010).

179. *See* CAL. FAM. CODE § 297.5 (2003). It is important to note that while this Note was being written, the Supreme Court of the United States issued a ruling regarding the constitutionality of Proposition 8, an initiative constitutional amendment that eliminated the right of same-sex couples to marry in California. *Hollingsworth v. Perry*, 133 S.Ct. 2652, 2659 (2013). Finding that the supporters of the ban on gay marriage did not have standing, the decision of the United States District Court for the Ninth Circuit will be upheld, and therefore “all persons under [California officials’] control or supervision” shall not enforce Proposition 8. *Perry v. Brown*, 671 F.3d 1052, 1069 (9th Cir. 2012). However, the fate of the state’s recognition of domestic partnerships is unknown, and therefore California has been included in the category of states with broad recognition laws.

180. *See* 2011 Haw. Sess. Laws. 232, ch. 1, § 9.

181. *See* 750 ILL. COMP. STAT. ANN. 75/20 (2013).

182. *See* OR. REV. STAT. § 106.340 (2009).

183. *See infra* notes 185-189 and accompanying text.

Article, many of the states with broad recognition laws treat the couples as marriages for purposes of state taxation.

Arguably, there is one other state that can be considered a broad recognition state: Nevada.¹⁸⁴ The Nevada law differs from the Vermont approach in that domestic partners "have the same rights, protections and benefits, and are subject to the same responsibilities, obligations and duties. . . as are granted to and imposed upon spouses."¹⁸⁵ However, the statute also expresses that private employers are not required to provide health care benefits to an employee's domestic partner.¹⁸⁶ The limited nature of Nevada's constitutional exclusion does not prevent it from being classified as broad recognition states for the purposes of this Article, as non-marital relationships in the state are afforded the majority of rights assigned to married couples, most notably spousal recognition for state tax purposes.

2. *States with Limited Recognition Laws*

States with limited recognition laws do recognize same-sex non-marital relationships but the rights extended to such unions are extremely limited compared to those extended to couples in states with broad recognition laws. While this Article was being written two states (Maine and Maryland), which would have been considered limited recognition states, actually granted recognition to same sex marriages via ballot referendums in the November 2012 election.¹⁸⁷ Consequently, there are only two

184. Rhode Island would also arguably have been considered a broad recognition state. However, during the writing of this Note the State enacted legislation legalizing same-sex marriages. R.I. GEN. LAWS § 15-1-1 (2013). Prior to this newly enacted legislation, Rhode Island same-sex civil unions, in which individuals would receive all the same "rights, benefits, protections, and responsibilities" as those married under Rhode Island law, except that it did not require religious organizations to recognize such unions. See R.I. GEN. LAWS § 15-3.1-6, 15-3.1-5 (2013).

185. NEV. REV. STAT. § 122A.200(1)(2013).

186. *Id.*

187. Erik Eckholm, *In Maine and Maryland, Victories at the Ballot Box for Same-Sex Marriage*, N.Y. TIMES, Nov. 7, 2012, http://www.nytimes.com/2012/11/07/us/politics/same-sex-marriage-voting-election.html?_r=0.

states (Colorado and Wisconsin) that recognize non-marital relationships that, for the purpose of this Article, have limited recognition laws.¹⁸⁸ However, because thirty states have enacted Constitutional amendments to specifically define marriage as between a man and a woman,¹⁸⁹ and the amendments in nineteen of these thirty states also expressly prohibit marriage equivalent non-marital relationships),¹⁹⁰ there is no doubt that the existence of limited recognition laws will continue, if not increase.

Colorado does not recognize non-marital relationships, but rather extends limited rights to same-sex couples via its use of designated beneficiaries.¹⁹¹ Colorado's Designated Beneficiary Agreement Act¹⁹² allows two unmarried adults to designate one another as beneficiaries.¹⁹³ As a designated beneficiary, an individual will have the ability to serve a conservator, guardian, dependent and even beneficiary.¹⁹⁴ However, designated beneficiaries are not recognized for all other state purposes and consequently are not able to receive the spousal benefits under the Colorado system of taxation.¹⁹⁵

Unlike Colorado, Wisconsin does recognize non-marital relationships.¹⁹⁶ In 2009, the Wisconsin legislature enacted a domestic partnership law, providing limited rights and protections to same-sex couples.¹⁹⁷ Not only is the 2009 enactment limited in nature, but Wisconsin also has a constitutional amendment through which the state refuses to recognize same-sex marriages and other relationships that are "identical or substantially similar" to marriage.¹⁹⁸ Due to the

188. See COLO. REV. STAT. § 15-22-105 (2013); WIS. STAT. § 770.001 (2009).

189. Wardle, *supra* note 90, at 161.

190. *Id.*

191. See COLO. REV. STAT. § 15-22-105 (2013).

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.*

196. WIS. STAT. §§ 770.001, 770.01(2) (2009).

197. WIS. STAT. § 770.001 (2009).

198. See WIS. CONST. art. XIII, § 13. (*Editor's note: As this Article was going to print,*

strict constraints of the constitutional amendment, coupled with the limited nature of Wisconsin's statute allowing domestic partnerships, those in same-sex non-marital relationships are not afforded rights similar to those married under state law. In both Colorado and Wisconsin, same-sex couples do not receive the same benefits, rights, or recognition that is afforded to married couples. Consequently, as proposed in Part V of this Article, non-marital relationships in these two states should not receive spousal recognition from the federal government.

C. STATES' TAXATION OF NON-MARITAL RELATIONSHIPS

Currently, all states with income taxes allow for the joint filing of state income tax returns by husbands and wives.¹⁹⁹ Moreover, all such states have filing statuses identical to those of the federal government: single, head of household, married filing separately, and married filing jointly.²⁰⁰ What is not so cohesive, however, is the way the states tax same-sex married couples and other non-marital relationships. Although there is a lack of uniformity among the states regarding the taxation of same-sex relationships, there is one factor that is dispositive for the sake of this analysis: the states intent, or lack thereof, to treat the relationship as a marriage equivalent.

Of the eighteen jurisdictions that recognize same sex-marriages²⁰¹, fifteen of them tax such marriages the same way they tax opposite-sex marriages. These fourteen jurisdictions are California, Connecticut, Delaware, Hawaii, Iowa, Illinois, Massachusetts, Maryland, New Hampshire, New Jersey, New York, Oregon, Vermont, Rhode Island, and the District of Columbia.²⁰² In all of these jurisdictions, the revenue

Wisconsin's ban on same sex marriage was deemed unconstitutional)

199. Smith, *supra* note 21, at 40.

200. *Id.*

201. *Id.* at 48-49 n.65.

202. *Id.* at 48-49 (Oregon recognizes only legal out of state same-sex marriages); Comptroller of Md., *Frequently Asked Questions About Income Tax*, SPOTLIGHT ON MD. TAXES (2014),

http://taxes.marylandtaxes.com/Resource_Library/Taxpayer_Assistance/Frequently

departments have announced that despite their inability to do so on the federal level, legally recognized same-sex couples may file joint state income tax returns.²⁰³ Of course, it comes as no surprise that these states allow same-sex married couples to file jointly, as such eligibility is consistent with each states' intent to treat such relationships as marriage equivalents.

Washington recognizes same-sex marriages but is not included in this group. Washington is the only state that solemnizes same-sex marriages that does not have a state income tax,²⁰⁴ and therefore the state is not going against its statutory intent of treating same-sex married couples in the same manner as different-sex married couples.

Additionally, there are six states with non-marital recognition laws that appear broad enough to treat same-sex couples as married for the purpose of state taxation. These states are Hawaii, Illinois, California, Oregon, and Nevada. Of these states, only Illinois,²⁰⁵ Hawaii,²⁰⁶ California²⁰⁷ and Oregon²⁰⁸ have announced that same-sex non-marital couples may file joint returns. Like Washington, Nevada does not have a state income tax and therefore its lack of a statement regarding marital recognition for taxation is irrelevant.²⁰⁹

[_Asked_Questions/Individual_Tax_FAQs/Income_Tax_FAQs/q29.shtml](#).

203. *Id.*

204. Although Washington does not have a state income tax, it has what is known as a Business and Occupation Tax. The Business and Occupation Tax is calculated based on gross receipts, rather than net income. Although individuals whose business is in the form of a sole proprietorship may be subject to the tax, the state does not allow joint filing of such returns by spouses. See *Business & Occupation Tax*, WASH. STATE DEP'T OF REVENUE, <http://dor.wa.gov/content/FindTaxesAndRates/BAndOTax/>.

205. *Same-Sex Civil Unions*, ILL. REVENUE, <http://tax.illinois.gov/Individuals/FilingRequirements/FilingStatus.htm> (last visited Mar. 17, 2014).

206. *Attorney General Opinions*, HI DEP'T OF TAXATION, http://tax.hawaii.gov/legal/a4_6agop/ (last visited Mar. 17, 2014).

207. *What if I'm a Domestic Partner?*, CAL. FRANCHISE TAX BD., <https://www.ftb.ca.gov/individuals/faq/dompert.shtml> (last visited Mar. 17, 2014).

208. *Registered Domestic Partners in Oregon*, DEP'T OF REVENUE, <http://www.oregon.gov/dor/pertax/pages/rdp.aspx#Introduction> (last visited Mar. 17, 2014).

209. Smith, *supra* note 21, at 46.

Conversely, as limited recognition states, the non-marital legislation of neither Colorado nor Wisconsin have the purported intent of treating same-sex couples equal to married couples. Consequently, parties in non-marital relationships in these states are not able to jointly file their state income tax returns, nor are they subject to the benefits, rights, and burdens associated with marital status in regards to taxation. As Part VI of this Article suggests, non-marital relationships in these states should not be recognized as marital equivalents, as doing so would be inconsistent with the legislative intent. All states that recognize same-sex marriages or that have broad recognition laws treat such couples equal to married couples for the purpose of state income taxation. As discussed in Part VI of this Article, a state's purported intent of equal recognition should be the determining factor in deciding whether or not the federal government should recognize the state's treatment of same-sex couples.

D. FOREIGN NATIONS' RECOGNITION AND TAXATION OF NON-MARITAL SAME-SEX RELATIONSHIPS

The assignment of marital rights to same-sex couples is a large area of contention in not just the United States, but essentially in a majority of the world. Similar to the progress same-sex rights have recently made in the United States, there are several foreign nations that now afford marital rights to same-sex couples. Twelve years ago the Netherlands became the first country to legalize same-sex marriages.²¹⁰ On April 1, 2001 the Dutch government approved legislation affording full marriage rights to same-sex couples.²¹¹ Since the Netherlands' ground-breaking legislation, sixteen countries now recognize same-sex marriages (Netherlands, Belgium, Spain, Canada,

210. Christy Glass et al., *Toward a 'European Model' of Same-Sex Marriage Rights: A Viable Pathway for the U.S.?*, 29 BERKLEY J. INT'L L. 132, 142 (2011).

211. *Id.*

South Africa, Norway, Sweden, Portugal, Iceland, Argentina, Denmark, France, Brazil, New Zealand, Uruguay, and Britain).²¹² Additionally, there are seven foreign nations that have broad recognition laws for non-marital same sex couples (Ecuador, Finland, Germany, Greenland, Hungary, Ireland, and Scotland).²¹³ Moreover, there are nine countries that have limited recognition laws for non-marital same sex couples (Andorra, Austria, Colombia, Croatia, Czech Republic, Liechtenstein, Luxembourg, Slovenia, and Switzerland).²¹⁴ Finally, although same-sex marriages cannot be performed in their jurisdictions, Israel and Mexico recognize same-sex marriages that have been officiated in other jurisdictions.²¹⁵

1. *The United Kingdom*

The United States' method of taxing spouses is quite unique in that not only are there two separate taxing entities (the federal and state taxing departments), but also in that the federal government allocates to the states the authority to regulate laws with respect to domestic relations. This combination is unlike most other nations, and therefore a seamless comparative analysis with a foreign jurisdiction is quite challenging. However, the United States and United Kingdom share many similarities in the way in which they afford recognition to same-

212. Freedom to Marry, Inc., *The Freedom to Marry Internationally*, FREEDOM TO MARRY, <http://www.freedomtomarry.org/landscape/entry/c/international> (last visited Jul. 28, 2013). As of January 2014, Britain had passed a law that has not yet taken effect. *Id.*

213. *Id.* It is important to note that currently the United Kingdom has passed preliminary legislation that would allow same-sex marriages. Although the law has not been finalized, there is a strong likelihood that same-sex marriage will become legal in the very immediate future. See Laura Smith-Spark & Atika Shubert, *UK Lawmakers Approve Same-sex marriage in First Vote*, CNN (Feb. 5, 2013), <http://www.cnn.com/2013/02/05/world/europe/uk-gay-marriage-vote/index.html>.

214. Freedom to Marry, Inc., *The Freedom to Marry Internationally*, FREEDOM TO MARRY, <http://www.freedomtomarry.org/landscape/entry/c/international> (last visited Jul. 28, 2013).

215. *Id.*

sex couples, thereby making them operative comparative nations. The most striking similarity, and the most useful in terms of this Article's comparison, is the similar method of incremental reform present in both jurisdictions. Like the rights afforded to same-sex relationships in the United States, what was once nonexistent in the United Kingdom has gradually gained recognition in several jurisdictions.²¹⁶ Moreover, in both jurisdictions, the laws regarding same-sex relationships have evolved slowly, with the judiciary playing a major role in its development.²¹⁷ Although there are several technicalities that make actual implementation of the United Kingdom's tax regime unlikely, a look into how the foreign nation recognizes non-marital relationships provides insight as to how a nation can recognize these less-traditional unions while staying consistent with legislative intent.

Currently, the rights afforded to same-sex couples in the United Kingdom are prescribed in the United Kingdom's Civil Partnership Act of 2004.²¹⁸ Enacted on November 18, 2004, the Act provides same-sex couples in England,²¹⁹ Wales,²²⁰ Scotland²²¹ and Northern Ireland²²² "legal recognition and

216. See Glass, *supra* note 209, at 133 n.5, 141.

217. Like the United States, uniform change throughout the United Kingdom came via judicial decision. In 1981, the European Court of Human Rights (ECHR) decided *Dudgeon v. United Kingdom* . . . [T]he ECHR importantly noted that the state of the law on legal regulation of sexual conduct between members of the same sex was not uniform throughout the United Kingdom . . . The *Dudgeon* ruling brought uniformity to the laws of the United Kingdom, but this uniformity was still discriminatory. Andrew Flagg, *Civil Partnership in the United Kingdom and a Moderate Proposal for Change in the United States*, 22 ARIZ. J. INT'L & COMP. L. 613, 617-19 (2006).

218. Civil Partnership Act, 2004, c. 33 (U.K.). On July 17, 2013, during the writing of this Note, the Queen of England granted royal assent to a bill that will allow same-sex marriages in England and Wales. *House of Lords*, UK PARLIAMENT, <http://www.publications.parliament.uk/pa/ld201314/ldhansrd/text/130717-0001.htm#13071765000369> (last visited Mar. 17, 2014). The Bill, which has no effect on the other territories in the United Kingdom, demands that the Secretary of State review the operation and future of the Civil Partnership Act 2004 in England and Wales. Marriage (Same Sex Couples) Act, 2013, c. 30 §2.15 (U.K.).

219. Civil Partnership Act, 2004, c. 33, Pt. 2 (U.K.).

220. *Id.*

221. Civil Partnership Act, 2004, c. 33, Pt. 3 (U.K.).

222. Civil Partnership Act, 2004, c. 33, Pt. 4 (U.K.).

substantial [civil] rights.”²²³ Under the Act, a civil partnership is defined as “a relationship between two people of the same sex (‘civil partners’) which is formed when they register as civil partners of each other” in any of the United Kingdom’s four countries.²²⁴ Although the legal recognition afforded to civil partners is not identical to that of a “civil marriage”, the Civil Partnership Act provides broad recognition laws to same-sex couples.²²⁵

Most noteworthy, as a result of the Civil Partnership Act, civil partners can receive the same tax and property benefits given to married couples. For instance, in the United Kingdom civil partners can claim the Married Couple’s Allowance.²²⁶ In civil marriages, the husband’s income is used in determining the Married Couple’s Allowance. In civil partnerships, however, the income of the highest earner is used.²²⁷ Given the stringent requirements of the Married Couples’ Allowance,²²⁸ this tax break is only beneficial to a very small minority of the United Kingdom. However, what is relevant to this comparative analysis is that the United Kingdom is extending a marital benefit to civil partnerships, while still allowing the individual jurisdictions to decide the level and method of recognition afforded to same-sex couples.

Additionally, civil partners in the United Kingdom have the potential to save substantial amounts of money via exemption from the inheritance tax. Due to the Civil Partnership Act, registered same-sex couples can now give and receive gifts

223. Flagg, *supra* note 216, at 614. See Civil Partnership Act, 2004, c. 33, §§ 65-72, 75-79, 83, 84 (U.K.).

224. Civil Partnership Act, 2004, c. 33, (U.K.).

225. Flagg, *supra* note 216, at 614.

226. Determined on a pro-rata basis, the Married couples allowance reduces the married couple’s tax bill up to £816.50. See *Married Couple’s Allowance*, GOV.UK (Nov. 8, 2013), <https://www.gov.uk/married-couples-allowance/overview>.

227. *Id.*

228. The Married Couple’s Allowance is only available to married couples or civil partners if at least one spouse was born before April 6, 1935. See *Married Couple’s Allowance- Includes Civil Partnerships*, HM REVENUE & CUSTOMS, <http://www.hmrc.gov.uk/incometax/married-allow.htm> (last visited Mar. 17, 2014).

without “attracting” the inheritance tax.²²⁹ Under the civil partner exception, married couples and civil partners can transfer assets to one another during their lifetime, or when they die, without being subject to the Inheritance Tax.²³⁰ This benefit is afforded to the civil partners because they are covered by the same spousal exemption rules that are applied to married couples.²³¹ Moreover, civil partners receive benefits regarding inheritance tax via their ability to transfer a deceased partner’s inheritance tax threshold to themselves.²³² To avoid being subject to the inheritance tax, the entire estate must meet the current threshold of £325,000.²³³ For any amount above £325,000, tax will be due at a rate of 40 percent.²³⁴ However, married couples and registered civil partners can transfer their unused inheritance tax threshold, making for a maximum threshold of £650,000.²³⁵ This inheritance exemption is not unlike the exemption found in Section 2010(c) of the IRC.²³⁶ There is, of course one substantial difference: the United Kingdom allows same-sex non-marital relationships to qualify for the benefits afforded by the exemption.

Civil partners can also take advantage of the reduction in capital gains tax, as afforded to married couples. Currently, each partner has an annual allowance of £10,900 (as is the same

229. *Civil Partnerships*, GUARDIAN (Dec. 5, 2005),

<http://www.guardian.co.uk/money/2005/dec/05/planningyourwedding.gayrights>.

230. See *Transferring an Unused Inheritance Tax Threshold*, HM REVENUE & CUSTOMS,

<http://www.hmrc.gov.uk/inheritancetax/intro/transfer-threshold.htm> (last visited Mar. 17, 2014).

231. *Id.*

232. *Id.* The inheritance tax threshold is also known as the “nil rate band.” *Id.*

233. £650,000 if deceased partner’s entire nil rate band was transferred to the surviving civil partner. *Id.*

234. *Inheritance*, GOV.UK (Dec. 27, 2013), <https://www.gov.uk/inheritance-tax#>.

235. The United Kingdom’s revenue offers its taxpayers examples on how this unusual concept of transferring thresholds work. See *Transferring an Unused Inheritance Tax Threshold*, HM REVENUE & CUSTOMS, <http://www.hmrc.gov.uk/inheritancetax/intro/transfer-threshold.htm> (last visited Apr. 19, 2014).

236. See I.R.C. § 2010(c) (2014), *supra* note 70 and accompanying text.

with non-married or non-registered individuals).²³⁷ The benefit afforded to same-sex couples comes with the ability to freely transfer the assets between one another before the assets are sold, allowing for optimal use of the capital gains tax allowance.²³⁸ Moreover, given the structure of the United Kingdom's tax code regarding married couples and registered civil partnerships, it is possible for these recognized unions to decrease their overall tax bill by distributing their wealth between the two parties, in order to maximize use of personal allowances.²³⁹ This optimal use of personal allowances results in the taxpayers being taxed at the lowest possible marginal rate.²⁴⁰

The United Kingdom's method of taxing civil unions exemplifies the logic in treating non-marital relationships the same as legally married couples for taxation purposes. Without making same-sex marriages legal in all of its jurisdictions, the United Kingdom is able to ensure that individuals in non-marital relationships receive the same benefits as married couples. It appears that the United Kingdom was cognizant of the fact that despite the inability of same-sex couples to receive marital recognition, individuals in such relationships undeniably act, live and engage in economic transactions in a manner identical to that of legally recognized married couples.

V. THE FEDERAL INCOME TAX AS APPLIED TO NON-MARITAL RELATIONSHIPS

Although the overturning of DOMA is a profound victory for the equal rights movement, it leads to another area of uncertainty regarding federal taxation. Now that there is no longer a roadblock preventing federal agencies from recognizing

237. See *Introduction to Capital Gains Tax*, HM REVENUE & CUSTOMS, <http://www.hmrc.gov.uk/cgt/intro/basics.htm> (last visited Apr. 19, 2014).

238. *Id.*

239. John Greenwood, *The Tax Advantages of Getting Married*, TELEGRAPH, June 11, 2012, <http://www.telegraph.co.uk/finance/personalfinance/consumertips/tax/9324479/The-tax-advantages-of-getting-married.html>.

240. *Id.*

same-sex married couples, the IRS will afford spousal recognition to such unions, as the IRC explicitly indicates that it recognizes "married individuals." However, this spousal recognition will not be extended to non-marital relationships, even in states where these unions are marriage equivalents. Unfortunately, this lack of federal recognition is generated by the mere terminology used to define the unions. The difference in legal recognition between marriages and non-marital relationships presents the problem analyzed in this Article: How should the IRS treat legally recognized non-marital relationships?

Not surprisingly, the IRS itself seems to be perplexed by this question. Currently, a limited number of states offer non-marital relationship recognition to *opposite-sex* couples.²⁴¹ Signed into law on January 31, 2011, the Illinois Religious Freedom Protection and Civil Union Act²⁴² allows all couples to enter into a civil union.²⁴³ Understandably confused, an advisor from H&R Block wrote to the IRS requesting information on the federal filing status of parties in opposite-sex civil unions.²⁴⁴ In response, the Chief Counsel's Office sent a letter stating, "[I]f Illinois treats the parties to an Illinois civil union who are of opposite sex as husband and wife [which Illinois law, practically speaking, does], they are considered 'husband and wife' for purposes of Section 6013 of the Internal Revenue Code."²⁴⁵ However, a few weeks later, the IRS posted a series of questions and answers regarding registered domestic partnerships.²⁴⁶ In addition to discussing the specific reporting rules applicable, the IRS addressed registered domestic partnerships generally saying that parties to such "cannot file using a married filing separately

241. Most notably, California and Illinois. See CAL. FAM. CODE §§ 297-297.5 (2003); Illinois Religious Freedom Protection and Civil Union Act, 750 ILL. COMP. STAT. 75/5 (2011).

242. See Illinois Religious Freedom Protection and Civil Union Act, 750 ILL. COMP. STAT. 75/10 (2011).

243. *Id.*

244. Smith, *supra* note 21, at 43 n.51.

245. *Id.*

246. *Id.* at 45-46.

or jointly filing status, because they are not spouses as defined by federal law.”²⁴⁷ Thereafter, the IRS amended its position even further, altering its posting on registered domestic partners to read, “Registered domestic partners. . .are not married for federal tax purposes.”²⁴⁸ Although the Chief Counsel’s letter is not binding authority,²⁴⁹ its contents exemplify the notion that even the federal agency in control of taxation is unaware of how to treat non-marital relationships.

VI. GOODBYE, DOMA. HELLO . . . MORE CONFUSION?

While the Court’s decision in *Windsor* was an undeniable victory for the gay rights movement, it is imperative to note that it did not concern the constitutional right of same-sex persons to marry. Consequently, the Court did not implement a national legalization of same-sex marriages, and therefore the states continue to have the ability to determine whether or not it will solemnize such unions. While the newly afforded federal recognition may motivate states to convert their non-marital relationships into marriages, this conversion certainly is not mandatory. Moreover, there are some states that will continue to refuse recognizing any form of same-sex relationship; this is particularly likely in the states that have made constitutional amendments banning the recognition of same-sex marriages.²⁵⁰ The undeniable presence of state recognized non-marital relationship, coupled with their lack of federal recognition, leads to another area of confusion—the taxation of marital equivalents.

247. *Id.*

248. Internal Revenue Service, *Answers to Frequently Asked Questions for Registered Domestic Partners and Individuals in Civil Unions*, INTERNAL REVENUE SERVICE (Sep. 19, 2013), <http://www.irs.gov/uac/Answers-to-Frequently-Asked-Questions-for-Registered-Domestic-Partners-and-Individuals-in-Civil-Unions>.

249. Smith, *supra* note 21, at 43-44 n.51.

250. For instance, Virginia has a constitutional amendment saying it will not “recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance, or effects of marriage” nor will it “recognize another union, partnership, or other legal status to which is assigned the rights, benefits, obligations, qualities, or effects of marriage.” See VA. CONST. art. I, § 15-A.

The question now becomes: How should the IRS now treat these couples?

A. *CONSISTENCY, CONSISTENCY, CONSISTENCY*

Following the lead of the Internal Revenue Service, all states that have income tax systems allow opposite-sex married couples to jointly file their income taxes.²⁵¹ In keeping consistent with the IRS' filing regulations, all states that impose an income tax also allow opposite-sex married individuals to file with a status of single, head of household, or even married filing jointly.²⁵² However, as discussed in Part III of this Article, there is a great deal of inconsistency among the states regarding the rights afforded to same-sex couples. Although DOMA has been ruled unconstitutional, states are still not forced to recognize same-sex marriages. The deferral to each state's local law determination of marital status eliminates the possibility of complete uniformity of same-sex recognition law across the nation. Given the obvious presence of inconsistencies, it is imperative that the IRS take the steps necessary to ensure that it is not contributing to the already all-too-present confusion. The most efficient solution, considering Congress' long-held goal of geographic uniformity and its deference to state regulation of marriage, is for the IRS to recognize non-marital relationships in the states that treat such unions as marriage equivalents.

1. *Congressional Aims*

Congress' enactment of the Revenue Act of 1948 clearly showed its purported intent of ensuring the constitutional requirement of geographic uniformity.²⁵³ Since the congressional enactment, substantial case law and legislation has shown both the judicial and legislative intent of the government to ensure geographic uniformity and horizontal

251. Smith, *supra* note 21, at 40.

252. *Id.*

253. See Milstein, *supra* note 17, at 460.

equity.²⁵⁴ In order for these ideals to be respected, the IRS must recognize not only married couples, but also non-marital relationships that serve as marriage equivalents.

Congress' adherence to the principle of geographic uniformity is undeniable in the area of federal taxation. Not only was geographic uniformity stated as the purpose of the joint-filing system created by the Revenue Act of 1948,²⁵⁵ but the Supreme Court has also echoed the sentiment that geographic uniformity is a constitutional requirement.²⁵⁶ Both the legislative and judicial proclamations regarding the importance of geographic uniformity came as a result of the patchwork nature of community property states. Furthermore, the remedial intent of the Revenue Act of 1948 was able to eliminate this geographic disparity. Unfortunately, however, due to the existing patchwork nature of states' recognition of same-sex relationships, the exact problem Congress eliminated is now infiltrating the taxation of non-marital relationships.

Similar to the geographic inconsistency of community property states prior to 1948, there is a patchwork of recognition of non-marital relationships among the states. Moreover, among the states that afford spousal rights to non-marital relationships, there is a patchwork nature of community property and non-community property laws. Take, for example, California and Illinois, both of which treat to non-marital relationships as marriage equivalents. California, however, is a community property state,²⁵⁷ whereas Illinois is not.²⁵⁸ In 2010, the IRS ruled that because California is a community property state, California registered domestic partnerships are entitled to the income

254. See, e.g., *Druker v. Comm'r*, 697 F.2d 46 (2d Cir. 1982); *Broder v. Cablevision Sys. Corp.*, 418 F.3d 187 (2d Cir. 2005); *In re Sullivan* 680 F.2d 1131 (7th Cir. 1982).

255. Wesley A. Dierberger, *Revenue Act of 1948*, 25 IND. L.J. 415, 415-16 (1950), available at <http://www.repository.law.indiana.edu/ilj/vol25/iss3/15/>.

256. *Poe v. Seaborn*, 282 U.S. 101, 117 (1930).

257. Smith, *supra* note 21, at 45.

258. Dennis J. Ventry, Jr., *Saving Seaborn: Ownership Not Marriage as the Basis of Family Taxation*, 86 IND. L.J. 1459, 1522 (2011) (Noting that Illinois is not on the list of community property states).

splitting approach, as prescribed in *Poe v. Seaborn*.²⁵⁹ Therefore, parties in a same-sex domestic partnership in California can split their income, while parties to a same-sex civil union in Illinois may not. The dispositive factor in these scenarios is not the sexuality of the involved parties, but rather the property laws of the respective states. Say, for example, Chris and Steve are in a recognized non-marital relationship and that Chris earned \$100,000 and Steve earned \$0. In California, a community property state, each could file a single federal tax return reporting \$50,000 of income, resulting in a lower aggregate tax paid due to the progressive nature of the tax system. In the non-community property state of Illinois, however, Chris would have to file as single and report the full \$100,000, resulting in a higher total tax paid. Undeniably, the current inconsistencies in the tax treatment of non-marital relationships are identical to those that the Court faced in *Poe v. Seaborn*²⁶⁰—preferential to community property states.

Just as Congress acted in 1948 to equalize the treatment of community property and non-community property states by creating a tax structure that effectively created the *Poe* outcome for everyone in opposite-sex marriages, Congress should amend the IRC to ensure that non-marital relationships in broad recognition states are subject to the same tax rate and other tax rules as those for spouses. Of course, it is the states that may choose, either through the legislative or constitutional process, to redefine marriage.²⁶¹ So too, it is the states that can afford the same benefits, burdens, and protections to non-marital relationships. If a state decides not to modify their familial law to recognize same-sex couples, the power is with the people of the state to take action via their ballots. The IRS cannot force states to give marital benefits to non-marital relationships, but it can—and in order to keep uniformity, it must—recognize the

259. *Poe*, 282 U.S. at 118.

260. *Poe*, 282 U.S. at 113-14.

261. See *Golinski v. Office of Pers. Mgmt.*, 824 F.Supp.2d 968, 988 (N.D. Cal. 2012).

legislative intent of the states.

Moreover, amending the IRC to recognize non-marital relationships in broad recognition states is necessary to preserve the second congressional aim of horizontal equity. The general concept of horizontal equity ensures that similarly situated taxpayers receive the same tax treatment. Undoubtedly, the Revenue Act of 1948 ensured horizontal equity among all the states, as the ability to split income was no longer determined by the residency of the taxpayers. However, the principles of horizontal equity are not designed exclusively for marital purposes. Rather, the concept focuses on the similarities of the parties involved.²⁶² Of course, horizontal equity regarding same-sex marriages will not be completely eliminated until such unions become legal in every state. However, now that DOMA has been overturned, in order to preserve horizontal equity, it is imperative that the IRS recognize non-marital relationships if the respective state considers them marriage equivalents.

Say, for instance, there is a same-sex married couple in Connecticut and a same-sex couple in a civil union in Illinois. The Illinois statute mandates that the same-sex couple receive “the same legal obligations, responsibilities, protections and benefits” that married couples receive.²⁶³ Assuming the couples have identical incomes, they are similarly situated. Although the couples in both states receive marital recognition for state tax purposes, the Connecticut couple will receive spousal recognition by the IRS, whereas the Illinois couple will not. The only feature distinguishing these two relationships is their different titles. As the Supreme Court held in *Hisquierdo v. Hisquierdo*, a mere conflict of words in family law is not sufficient.²⁶⁴

262. *Poe*, 282 U.S. at 117-18.

263. 750 ILL. COMP. STAT. 75/20 (2009).

264. *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581 (1976).

2. *Deferral to State Family Law*

Affording federal recognition to non-marital relationships in broad recognition states will also keep consistent with the IRS' long held precedent of deferring to state marital law. Since 1958, the IRS has allowed state law to define the marital status that will be referred to for federal taxation purposes.²⁶⁵ In that year, the Internal Revenue Board issued a ruling that "the marital status of individuals as determined under state law is recognized in the administration of the Federal income tax laws."²⁶⁶ Several years later, in 1980, the Tax Court held that "the determination of the marital status of the parties must be made in accordance with [state law]."²⁶⁷ More recently, in *Hisquierdo*, the Supreme Court emphasized this point holding that,

On the rare occasion when state family law has come into conflict with a federal statute, this Court has limited review under the Supremacy Clause to a determination whether Congress has 'positively required by direct enactment' that state law be preempted. . . A mere conflict in words is not sufficient. State family and family-property law must do 'major damage' to 'clear and substantial' federal interests before the Supremacy Clause will demand that state law be overridden.²⁶⁸

There is undeniably a long-standing precedent established through substantial case law requiring the IRS to defer to state law determinations of marriages. The Supreme Court's holding in *Hisquierdo* is broad enough to ensure that such deferral be made in the context of non-marital relationships. The Court does not use limiting words such as marital law, marriage, or even spouse. Rather, the Court carefully uses the word "family," a term which by no means can exclude those involved

265. Hayes, *supra* note 13, at 1615.

266. Rev. Rul. 58-66, 1958-1 C.B. 60.

267. Boyter v. Comm'r, 74 T.C. 989, 994 (1980) (citing Dunn v. Comm'r, 64 T.C. 361 (1978)).

268. *Hisquierdo*, 439 U.S. at 581.

in non-marital relationships. Consequently, the federal government must yield to state law provisions regulating non-marital relationships.

However, this does not mean that the IRS should afford recognition to all non-marital relationships. Not only must the IRS remain consistent with its long held precedent of deferring to state law, it also must remain consistent with the actual state law. Therefore, this Article suggests that the IRS give spousal recognition to the parties of non-marital relationships only in the states that consider these unions to be marriage equivalents. In doing so, the IRS will not only be consistent with long held precedent, but it will also remain consistent with the legislative intent of the federal government and the respective states.

VII. CONCLUSION

To ensure a peaceful co-existence with an ever-progressing society, Congress has continually enacted, amended, and removed laws in order to conform to the needs of American citizens. A country that was once plagued with racial inequalities now prides itself on diversity. Similarly, over the past century, the tax laws have substantially changed not just because of a change in the government's fiscal needs, but also because of a change in societal needs. Like the biracial married couple in *Loving v. Virginia*, taxpayers in same-sex relationships will eventually receive equal taxation, for they too are just that: *tax payers*. Of course, it is up to the people of the states to decide, via their electoral right, the definition of a marriage. The least the federal government can do is respect the wishes of the states, for they are presumably respecting the wishes of their people. In a post-DOMA world, the IRS must afford legal recognition to non-marital relationships in broad recognition states. Otherwise, we have reverted back to the exact situation we faced in 1948.

